APPENDIX A-OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED MARCH 2, 2005

[DO NOT PUBLISH]

No. 04-14611
Non-Argument Calendar
D.C. Docket No. 03-219121-CV-SH

HAROLD KLAPPER,

Plaintiff-Appellant,

versus

CHRISTOPHER CONNELLY,
MORGAN STANLEY DW, INC.

Defendants-Appellees.

Appeal from the United District Court
for the Southern District of Florida

(March 2, 2005)

Before CARNES, MARCUS and PRYOR, Circuit Judges,
PER CURIAM:

Harold Klapper is a member of the bar of the State of Florida who appears *pro se* and appeals the dismissal, under Federal Rules of Civil Procedure 12(b)(1), of his motion to vacate an award in arbitration. Because the district court correctly concluded that it lacked subject matter jurisdiction over Klapper's dispute with Christopher Connelly and Morgan Stanley

Dean Whitter, Inc. (MSDW), we affirm the dismissal of Klapper's motion to vacate.

An arbitration panel of the National Association of Securities Dealers ruled against Klapper in his dispute with Connelly, Klapper's financial advisor, and MSDW, Connelly's employer, regarding losses Klapper incurred as a result of his stock holdings. Klapper filed a motion in the district court to vacate the award of the arbitration panel under the Federal Arbitration Act. Klapper contended that the arbitration award was fraudulently gained; the arbitrators committed corruption, fraud, and misconduct; the arbitrators acted contrary to law; and the award was "arbitrary and capricious" and "contrary to public policy." Connelly and MSDW moved to dismiss Klapper's motion to vacate. The district court dismissed the motion because the court determined that it lacked subject matter jurisdiction.

"Subject matter jurisdiction is a question of law subject to *de novo* review." *Williams v. Best Buy*, 269 F.3d 1316, 1318 (11th Cir. 2001). The district court could have had jurisdiction in one of three ways (1) under a specific federal statutory grant of jurisdiction, (2) federal question jurisdiction under 28 U.S.C. section 1331, or (3) diversity jurisdiction under 28 U.S.C. section 1331, or (3) diversity jurisdiction under 28 U.S.C. section 13312. *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466, 1469 (11th Cir. 1997). Klapper does not assert that diversity jurisdiction exists, so we will consider the other two possible bases.

The first option fails because there is no grant of jurisdiction in the Federal Arbitration Act for Klapper's complaint. "FAA sections 10 and 11, which allow courts to vacate, modify, or correct arbitration awards, do not confer federal subject matter." *Id.* at 1470; *see also id* at 1472. The district court, therefore, did not have jurisdiction under the Federal Arbitration Act.

The second option also fails. Klapper argues that he pleaded a 42 U.S.C. section 1981 civil rights claim in his motion to vacate, but the motion does not lend itself to such a reading. The comments of the arbitrator about which Klapper complained also cannot be construed in any way as evidencing racial animus.

The dismissal of Klapper's motion to vacate was proper. In addition, Klapper complaint, of impropriety by the district court is frivolous.

AFFIRMED.

APPENDIX B-FINAL JUDGMENT ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED AUGUST 11, 2004

Case No. 03-21921-CIV- HIGHSMITH, Magistrate Judge W.C. Turnoff

HAROLD KLAPPER,

Plaintiff

v

CHRISTOPHER CONNELLY, MORGAN STANLEY DW, INC.

Defendants

FINAL JUDGMENT ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

THIS CAUSE is before the Court for review of United States Magistrate William C. Turnoff's report and recommendation (the "R & R") to which objections have been filed (DE 26-27,31). The R & R advises that Defendant's motion to dismiss should be granted.

After a careful *de novo* review of the R & R, Plaintiff's objections, the case file, and the pertinent authorities, the Court concurs with Magistrate Judge Turnoff's findings and analysis and hereby ADOPTS the R &R. It is therefore ORDERED AND

ADJUDGES that;

Defendant's motion to dismiss GRANTED. ALL motions not otherwise ruled upon are DENIED as MOOT. This case is CLOSED.

DONE AND ORDERED in Chambers at Miami, Florida, this 11th of August, 2004.

s/
(For) SHELBY HIGHSMITH
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Turnoff
Harold Klapper, *Pro Se*
Lorie M. Gleim, Esq.

APPENDIX C-REPORT AND RECOMMENDATION FILED JUNE 14, 2004

Case No. 03-21921-CIV- SH,
Magistrate Judge Turnoff

HAROLD KLAPPER,

Plaintiff

v

CHRISTOPHER CONNELLY,
MORGAN STANLEY DW, INC.

Defendants

REPORT AND RECOMMENDATION

This Cause comes before the undersigned for a Report and Recommendation on Defendants' Motion to Dismiss (D.E.12). After a thorough review of the record and the parties' submissions, the undersigned recommends that Defendants' Motion be GRANTED.

BACKGROUND

On July, 17, 2003 Plaintiff Harold Klapper ("Klapper") instituted the present action by filing a Motion to Vacate Award of the NASD pursuant to the Federal Arbitration Act ("FAA"). (D.E. 1.) Therein, Klapper requests that an arbitration award issued by the National Association of Securities Dealers ("NASD") be set aside on the basis that (1) the award was

procured by corruption, fraud, and undue means; (2) there was evident partiality and corruption by the arbitrators; (3) the arbitrators were guilty of misconduct in refusing to hear evidence; (4) the award is arbitrary and capricious; (5) the arbitrators acted with manifest disregard for the law; and (6) the award is contrary to public policy. (D.E. 1.) Alternatively, Klapper seeks to obtain a new hearing by a new panel unrelated to NASD.

On July 22, 2003, Klapper filed a "Certificate of Service," stating that the Motion to vacate had been served on July 18, 2003, via certified U.S. Mail, on counsel for Defendants. (D.E. 4.) Soon thereafter, on August 13, 2003, Klapper filed a Motion for Default Judgment (D.E.6), stating that Defendants' failure to respond to the Motion to vacate warranted the Court's granting of same. (D.E. 8.) Klapper filed a second Motion for Default Judgment on September 9, 2004 (D.E. 6), reiterating these same arguments.

On September 16, 2003, Defendants filed a Motion to Dismiss. (D.E.12.) **Inter alia**, Defendants claim this matter should be dismissed, because: (1) this Court lacks subject matter jurisdiction in this cause; and, (2) Klapper failed to effectuate service on Defendants pursuant to Fed. R. Civ. P. 4. In response, Klapper contends that the Court possesses subject matter jurisdiction because he has not only alleged a cause of action pursuant to the FAA, but has alleged a cause of action pursuant

to 42 U.S.C.§1981. Moreover. Klapper contends that service on Defendants' counsel via U.S. Mail is sufficient to confer personal jurisdiction pursuant to the mandates of the FAA.

ANALYSIS

I. Legal Standard

To warrant dismissal of a complaint[1] under Rule 12 of the Federal Rules of Civil Procedure, it must be "clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir. 1994). In ruling on a motion to dismiss, the court is required to accept all factual allegations in the complaint as true and evaluate all inferences derived from those facts in a light most favorable to the plaintiff. *See Hunnings v. Texaco*, 29 F.3d 1480, 1483 (11th Cir. 1994). Moreover, a complaint should not be dismissed unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Sea*

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[1]Notably, the FAA provides that the filing of a "complaint" is not the proper mechanism by which to commence proceedings under same. Instead the FAA provides that any "application to the court shall be made and heard in the manner provided by law for the making and hearing of motions." 9 U.S.C. §6. Therefore, it is not clear whether filing a motion to dismiss is an appropriate response to a motion to vacate. Regardless, because the issue does not affect the Court's reasoning, the Court will assume that the parties proceeded correctly, and will apply the analytical framework required for a motion to dismiss. *E.g., Nordahl Development Corp., Inc. v. Salomon Smith Barney*, 309 F. Supp.2d 1257 (D. Or. 2004).

Vessel v. Reyes, 23 F.3d 345, 347 (11th Cir. 1994). Nevertheless, to survive a motion to dismiss, a plaintiff must do more than merely "label" his claims. *Blumel v. Mylander*, 919 F.Supp. 423, 425 (M.D. Fla. 1966). When, on the basis of a dispositive issue of law no construction of the factual allegations will support the stated cause(s) of action, dismissal of the complaint is appropriate. *Marshal! County Bd. Of Educ. v. Marshall County Gas Dist., 992 F.2d 1171, 1174 (11th Cir. 1993).*

II. Defendant's Motion to Dismiss

A. Subject Matter Jurisdiction

The first argument presented by Defendants in their Motion to Dismiss involves whether this Court possesses subject matter jurisdiction over Klapper's Motion to Vacate. Importantly, the FAA does not confer an independent statutory grant of subject matter jurisdiction to federal courts; federal courts must have an independent jurisdictional basis to entertain cases arising under FAA. *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466 (11th Cir. 1997).

Similar to the instant action, in *Baltin*, the plaintiffs filed an action to vacate. modify or correct an arbitration award pursuant to sections 10 and 11 of the FAA. 9 U.S.C. §§ 10,11. Although the issue of jurisdiction was not raised by the defendant at issue, the *Baltin* court conducted a plenary review of subject matter jurisdiction *sua sponte*. *Id*, at 1468. In doing so, the *Baltin* court held that, although the federal and state courts

posses concurrent jurisdiction to enforce the FAA, the FAA does not confer subject matter jurisdiction on federal courts. Instead, federal courts must have an independent jurisdictional basis to entertain cases arising under the FAA:

> The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C.§ or otherwise.

Id. at 1469 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S.1, 25 (1983.) Thus, the court concluded that there must be diversity of citizenship or some other independent basis for federal jurisdiction where a party seeks to vacate, modify or correct an arbitration award to the FAA. *See also Household Bank v. JFS Group*, 320 F.3d 1249, 1253 (11th Cir. 2003).

Because the FAA does not provide an independent statutory grant of subject matter jurisdiction, this Court must examine whether it possesses jurisdiction over Klapper's case via other means. A federal district court can establish subject matter jurisdiction in one of three fashions: (1) jurisdiction pursuant to specific statutory grant; (2) federal question jurisdiction pursuant to 28 U.S.C.§1931; or (3) diversity jurisdiction pursuant to 28 U.S.C.§1332(a).

Appendix C

1. Federal Question

In his Motion to Vacate, Klapper alleges that the arbitration award issued by the NASD panel should be set aside because: (1) it was procured by corruption, fraud and undue means; (2) it was the result of evident partiality and corruption amongst the arbitrators; (3) the arbitrators were guilty of misconduct in refusing to hear evidence; (4) the award is arbitrary and capricious; (5) the arbitrators acted with manifest disregard for the law; and (6) the award is contrary to public policy. All of these criteria are either contained in section 10 of the FAA, or are court-extended interpretations of same. 9 U.S.C.§10. *See also Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456, 1458 (11th Cir. 1997 (citing *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775 (11th Cir. 1993)). Nowhere in Klapper's Motion to vacate does he raise an independent federal basis for review of the NASD panel's arbitration results.

In an effort to establish an independent basis for federal jurisdiction, Klapper contends in his Response that this action is also instituted pursuant to 42 U.S.C. §1981, because the "entire NASD panel was racially motivated against" him as a jewish man. As explained below, however, Klapper has failed to allege a cause of action pursuant to 42 U.S.S. §1981.

The pleading requirements of 42 U.S.S. §1981 are liberal. To properly state a claim under 42 U.S.S. §1981, an injured party need only allege: (1) that a violation of civil rights

based upon racial animus took place: and (2) that the Plaintiff suffered treatment disparate from that afforded white citizens. *Harris v. McDonald's Corporation*, 901 F. Supp. 1552, 1558 ((M.D. Fla. 1995). Despite this liberal pleading standard, there are no allegations in Klapper's Motion to Vacate that support the contention that Klapper suffered a violation of his civil rights as a result of racial animus. Moreover, there are no such allegations in Klapper's Memorandum to vacate Award of NASD (D.E.2) and Affidavit of Movant (D.E.3) (filed concurrently with the Motion to Vacate) that would support such a claim.

In fact, the undersigned cannot glean a single factual allegation from Klapper's filings that contain a reasonable charge that a violation of Klapper's civil rights took place, and that Klapper suffered treatment disparate from that afforded white citizens. Instead, Klapper's filings contain a rambling narrative of charges and conclusions that cannot be meaningfully distinguished from sharp harangues and personal comments. For instance, when Judge Breger evidently asked Klapper whether he lived alone, Klapper indicated:

> His tone was sinister, his intent Tribal, his prejudice overt. It was nobody's business. How did he find out? As shall be seen, this was the first of the ongoing corruption....

(Affidavit, D.E. 3, p.3.) Further, Klapper claims that Judge Breger's claim that he "hate[s] Lou Dobbs," and always "turn[s]

to the local news" evinces Judge Breger's anti-semitic propensities, because:

> This was Judge Breger saying again you are not one of us....In the morning of the second day, he [Judge Breger] said to me before the start, "You went to Beach High didn't you?" "No, Miami High." He turned away in disgust. In his world one is not an American; rather born a member of the Tribe - his way.

(Affidavit, D.E. 3, P.11.) In short, there can be no logical construction of these allegations that would support a cause of action under §1981.[2] Thus, Klapper's stated claims of discrimination are so "attenuated and unsubstantial" as to be absolutely devoid of merit. *Household Bank*, 320 F.3d at 1254 ("The dismissal of a federal-question claim for lack of subject matter jurisdiction is justified only if that claim was so attenuated and unsubstantial as to be absolutely devoid, or frivolous")[citations omitted].

In light of the foregoing, the undersigned concludes that Klapper has failed to allege a cause of action that is independent of the FAA. Therefore, no federal jurisdiction lies as a result of a raised federal question.

2. <u>Diversity of Citizenship</u>.

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[2]Although Klapper is a *pro se* plaintiff, it is worth noting that he is also a licensed attorney in the State of Florida. (D.E.3, p.1) As a member of the Florida Bar, he should be aware of these basic pleading requirements.

Appendix C

The next inquiry for the Court involves whether diversity of citizenship exists between the parties. Pursuant to 28 U.S.C. §1332, a federal court has subject matter jurisdiction in a civil action where the amount in controversy exceeds $75,000 and is between citizens of different states. *See* 28 U.S.C. §1332. In the present cause, Klapper claims damages in the amount of $101,404, independent of interest and costs. As such, there appears to be no dispute that the matter in controversy exceeds the sum of $75,000. Thus, the remaining issue for the Court's consideration involves whether Defendants are citizens of states other than Florida.[3]

It is axiomatic that diversity jurisdiction is available only when all adverse parties to a litigation are completely diverse in their citizenships. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-4 (1978) ("[Diversity jurisdiction does not exist unless *each* defendant is a citizen of a different State from *each* plaintiff....[D]iversity jurisdiction is not to be available when any plaintiff is a citizen of the same State as any defendant.") Thus, there must be complete diversity of citizenship for the Court to possess subject matter jurisdiction over this case.

In the present matter, there is diversity of citizenship between Klapper and Morgan Stanley, a Delaware corporation with its principal place of business in New York. 28 U.S.C. §1332. However, such diversity does not lie between Klapper

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[3]Pursuant to the filings, Klapper's domicile is in Miami, Florida.

and Defendant Christopher Connelly. Connelly worked as a financial advisor in Morgan Stanley's Coral Gables, Florida office. (D.E.3.) Defendant has asserted that Mr. Connelly is a citizen of Florida. (D.E.12.) In his Response, Klapper does not refute this assertion. Under the applicable law, therefore, there is not complete diversity amongst the parties, and no federal jurisdiction lies as a result of diversity of citizenship.

Accordingly, it appears that the Court lacks subject matter jurisdiction over the causes, there is no federal question at issue beyond the FAA, and there is no complete diversity of citizenship between all plaintiffs and defendants.

C. Personal Jurisdiction - Default and Service Issues

Although the lack of subject matter jurisdiction, discussed above, is dispositive of this cause, the undersigned will address the arguments raised in Defendants' Motion to Dismiss pertaining to the issue of service. As explained above, on July 22, 2003, Klapper filed a "Certificate of Service," stating that the Motion to vacate had been served via certified U.S. Mail on counsel for Defendants. (D.E.4.) When Defendants failed to timely respond to the Motion, Klapper filed two Motions for Default judgment (D.E. 6 & 11), stating that Defendants' failure to respond warranted entry of a default judgment in the principal sum of $101,404.[4] Notably, Klapper did not serve Defendants

[4]Klapper also sought to recover interest, punitive damages and costs.

with either Motion for Default.

On March 29, 2004, the undersigned denied Klapper's Motions for Default. In doing so, the Court found that Klapper's initial petition for relief in this cause failed to comply with the service requirements of Rule 4 of the Federal Rules of Civil Procedure. (D.E.17.) However, upon reviewing the parties' respective legal memoranda pertaining to defendants' Motion to Dismiss, it appears that the undersigned must reexamine its prior ruling pertaining to service. *See, e.g., Ferrara & Hantman v. Alvarez (In re Engel)*, 124 F.3d 567 (3d Cir. 1997)("A court always has the power to reexamine, modify vacate, correct and reverse its prior rulings and orders.")

Section 12 of the FAA provides in pertinent part:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party *or his attorney* within three months, after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law *for service of notice of motion in an action in the same court.*

9 U.S.C. §12 [emphasis supplied]. Federal courts in other jurisdictions have interpreted this provision to mean that service may be completed by U.S. Mail. *See Escobar v. Shearson Lehman Hutton, Inc.*, 762 F.Supp. 461,463 (D. Puerto Rico 1991). *Cf. Possehl, Inc. v. Shanghai Hia Xing Shipping*, 2001 WL. 214234 (S.D.N.Y. 2001). Therefore, Klapper's mailing to

Defendants' counsel, who also represented Defendants at the arbitration, may comprise sufficient service of a Motion to Vacate pursuant to FAA.

That notwithstanding, however, the outcome of the undersigned's March 29, 2004 order should remain unchanged. The Eleventh Circuit views defaults with disfavor, due to the strong policy of determining cases on their merits. *Florida Physican's Insurance Company, Inc. v. Ehlers*, 8 F.3d 780 (11th Cir. 1993). Defendants mistakenly believed no service had been lawfully effectuated in this case, as Klapper failed to comply with the requirements of Rule 4, Federal Rules of Civil Procedure. Moreover counsel for Defendants claims that he believed "the copy received by mail was a courtesy copy of the pleading and was waiting for his client to be served before responding." (D.E. 12, n.2.) This, coupled with the fact that Motions for Default were not served on Defendants (D.E.11), comprises good cause and excusable neglect for Defendants' delay in responding to the Motion to Vacate. Accordingly, default is not warranted in this matter.

RECOMMENDATION

In light of the foroing, IT IS HEREBY RECOMMENDED that Defendants' Motion to Dismiss (D.E.12), be GRANTED.

Pursuant to S.D. Fla. Magistrate Rule 4(b), the parties may serve and file written objections with the Honorable Shelby

Highsmith, United States District Judge, **on or before June 21, 2004.** Any response thereto shall be filed **on or before July 6, 2004.** Failure to file timely objections shall bar the parties from attacking on appeal any factual findings contained herein. *RTC v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993); *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988).

RESPECTFULLY RECOMMENDED in Chambers, at Miami, Florida this 10 day of June 2004.

s/
WILLIAM C. TURNOFF
United States Magistrate Judge

c: Hon. Shelby Highsmith
counsel of record
Harold Klapper, *pro se*

APPENDIX D-ORDER
FILED MARCH 30, 2004

Case No. 03-21921-CIV- SH,
Magistrate JUDGE TURNOFF

HAROLD KLAPPER,

Plaintiff

v

CHRISTOPHER CONNELLY,
MORGAN STANLEY DW, INC.

Defendants

ORDER

This Cause comes before the undersigned on Plaintiff's Motions for Default Judgment (D.E.6, 11-2). For the reasons set forth below, Plaintiff's Motions are DENIED.

On July 17, 2003, Plaintiff Harold Klapper ("Klapper") instituted the present action by filing Motion to Vacate Award of the NASD ("Motion to Vacate"). (D.E.1.) On July 22. 2003, Klapper filed a "Certificate of Service," stating that the Motion to Vacate had been served via certified U.S. Mail on counsel for Defendants. (D.E.4.) When Defendants failed to file a timely response to the Motion to vacate, on August 13, 2003, Klapper filed a Motion for Default Judgment (D.E.6). Klapper subsequently restated his request for a default judgment in a

Appendix D

September 2, 2003 Motion for Findings to Vacate Award of the NASD and for Judgment by Default. (D.E. 11-2.)

On September 16, 2003, Defendants filed a Motion to Dismiss. (D.E. 12.) *Inter alia*, Defendants maintain that Klapper's Certificate of Service" was an insufficient means by which to effectuate service in this cause pursuant to Fed. R. Civ. P. 5.

Rule 5 of the Federal Rules of Civil Procedure only applies to filings made *"subsequent* to the original complaint." Fed. R. Civ. P.5 [emphasis supplied]. Although Klapper styled his initial petition for relief in this cause as a "Motion to Vacate" this does not overcome the fact that the "Motion" is in fact the initial pleading before this Court, thereby requiring service of process pursuant to Rule 4 of the Federal Rules of Civil Procedure . In light of the foregoing, the undersigned concludes that Defendants have not been properly served in this action. Accordingly, it is hereby

ORDERED AND ADJUDGED that Plaintiff's Motions are DENIED. Each party shall bear its own fees and costs incurred in connection with the present Motions.

DONE AND ORDERED in Chambers, at Miami, Florida this 29 day of March 2004.

s/
WILLIAM C. TURNOFF
United States Magistrate Judge

c: Hon. Shelby Highsmith
counsel of record
Harold Klapper, *pro se*

APPENDIX E-ORDER OF REFERENCE
FILED AUGUST 18, 2003
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 03-21921-CIV- HIGHSMITH,

HAROLD KLAPPER,

Plaintiff

v

CHRISTOPHER CONNELLY,
MORGAN STANLEY DW, INC.

Defendants

ORDER OF REFERENCE

THIS CAUSE is before the Court upon the Complaint/Motion to Vacate Award of the NASD and the Motion For Judgment by Default. As is apparent that the plaintiff is proceeding *pro se* in this matter, it is hereby

ORDERED that the following matters are referred to United States Magistrate Judge William C. Turnoff for appropriate resolution pursuant to Rule 1 of the Magistrate Rules of the Southern District of Florida:

ALL PRETRIAL MATTERS.

Pursuant to this referral order, it is also

ORDERED AND ADJUDGED that it shall be the responsibility of the respective parties in this case to note on all

materials necessary to the resolution of the referred matters the name of Magistrate Judge Turnoff on the case number caption (CASE NO. 03-21921-CIV-HIGHSMITH/TURNOFF) and that courtesy copies of such materials shall be directed to his chambers.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 15 day of August, 2003.

s/
(For) SHELBY HIGHSMITH
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Turnoff

Harold Klapper, *Pro Se*
11003 SW 88th Street
Apt. B-206
Miami, FL 33176

Greenberg, Traurig LLP
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APPENDIX F - SIGMA DELTA CHI FIRST AMENDMEMT AWARD

Miami Court Reporter Selected for Pulliam First Amendment Award

FOR IMMEDIATE RELEASE
8/26/2004

CONTACT:
Georgiana Vines, Chair, Grants and Awards Committee, Sigma Delta Chi Foundation, 865/342-6343 or vines@knews.com
Sue Porter, President, Sigma Delta Chi Foundation, 513/977-3030 or porters@scripps.com
Joyce Dobson, Development Director, Sigma Delta Chi Foundation, 317/927-8000 ext. 213 or jdobson@spj.org

INDIANAPOLIS -- Dan Christensen of the Miami Daily Business Review will receive the 2004 Eugene S. Pulliam First Amendment Award for reporting on secret court cases in the U.S. District Court in Miami.

Dan Christensens work on behalf of the First Amendment is an excellent example of one journalists dedication to exposing secrecy that is becoming all too common, said Georgiana Vines, chair of a five-member panel of judges and 1992-93 national president of the Society of Professional Journalists. This was a

form of secrecy that hid everything, including the case number.

The $10,000 award presented by the Sigma Delta Chi Foundation honors Pulliam, who was publisher of The Indianapolis Star and The Indianapolis News at the time of his death in 1999. The Eugene S. Pulliam First Amendment Award was established to honor Pulliams name, work and First Amendment legacy. He was well-known for consistently supporting activities which educated the public about First Amendment rights and values. The award will be presented during the closing banquet at the annual SPJ National Convention in New York City on Sept. 11.

The Sigma Delta Chi Foundation is the fund-raising and educational arm of SPJ.

In March 2003, Christensen broke the story of Mohamed K. Bellahouel, an Algerian-born U.S. resident who was detained secretly for five months after the Sept. 11, 2001 attacks.

At a time when there is growing secrecy in government as a result of the Patriot and Homeland Security Acts, the judges felt Dan Christensen stood out for his efforts in attracting national attention to the Bellahouel case and court secrecy in general, said Vines, associate editor of The Knoxville (Tenn.) News Sentinel

Appendix F

He was tipped to the secret case with a clue in the daily calendar of the U.S. Court of Appeals in Miami. He made phone calls and then showed up at a hearing only to be told he could not attend. Christensen eventually realized that the entire case was taking place in the U.S. District Court in Miami.

Bellahouel had been detained for overstaying his student visa after FBI agents learned he had worked as a waiter at a restaurant in Delray Beach patronized by some of the al Qaeda hijackers, and he was accused of accompanying one of them to a nearby movie. He was released after authorities apparently concluded he wasnt a threat.

Bellahouel filed a writ of habeas corpus to seek release, and that action continued as he sought to open his case to the public. He eventually filed an appeal with the U.S. Supreme Court, though the pleadings were heavily redacted and the case was listed only as M.K.B. v. Warden on the high courts docket.

Lucy Dalglish, executive director of The Reporters Committee for Freedom of the Press, nominated Christensen for the Pulliam First Amendment Award.

Dalglish said that to her organizations knowledge, no other case filed with the Supreme Court has been handled with such

excessive secrecy. Only through Christensens reporting did the public have any idea what the case was about.

The Reporters Committee and 22 other organizations sought to intervene in the case.

When the U.S. Supreme Court rejected Bellahouels petition, the court denied the request to intervene. Then in February, the 11th U.S. Circuit Court of Appeals in Atlanta allowed the case to be listed on the courts public docket although much of the case remained under seal. Christensen, who writes a weekly news column along with covering federal courts for the Miami Daily Business Review, wrote that it was a mystery why the Circuit Court chose to publicly docket the case after the Supreme Court refused to review it. Christensen reported that the docketing of the case and 11th Circuits public statement of Bellahouels name was a tacit acknowledgement that the court had used a secrecy practice it supposedly outlawed in a previous ruling.

Christensen also was the first to report on secretive practices in another case in Miami federal court, United States vs. Fabio Ochoa-Vasquez. Federal prosecutors had filed a set of indictments against reputed Columbian drug traffickers as part of Operation Millennium. Christensen discovered that at least one defendant in the alleged conspiracy, Nicholas Bergonzoli, had

been prosecuted, convicted and imprisoned in total secrecy. Christensens reporting gained the attention of media and public interest organizations, including the American Civil Liberties Union of Florida, the Florida Association of Trial Lawyers and The Reporters Committee for Freedom of the Press. Each has filed friend-of-the-court briefs urging the U.S. Court of Appeals in Miami to declare unconstitutional the secretive practices that Christensen had documented. That appeal is pending.

Before joining the Review in 1989, Christensen was a reporter at The Miami News. Earlier, he was a staff writer at what is today the South Florida Sun-Sentinel. Christensen grew up in Hillsdale, N.J., and earned undergraduate and graduate degrees at the University of Miami in Coral Gables, Fla.

Christensens nomination was selected from a field of 34 entries.

Vines chaired the judging committee in her role as chair of the Sigma Delta Chi Foundations grants and awards committee. Other judges were Russell B. Pulliam, Pulliams son and associate editor of The Indianapolis Star; Ken Bunting, executive editor of the Seattle Post-Intelligencer; Kelly Hawes, 1995-96 SPJ national president who lives in Lake Jackson, Texas; and Charles Davis, co-chair and executive director, Freedom of Information Center, and associate professor, news-editorial, Missouri School

of Journalism in Columbia.

Founded in 1961, the Sigma Delta Chi Foundation a tax-exempt, 501(c)(3) public foundation that is dedicated to ensuring that those who carry on the tradition of a free press are prepared for the challenge. Its goal is to support the educational programs the Society of Professional Journalists and to serve the professional needs of journalists and students pursuing careers in journalism.

The Society of Professional Journalists works to improve and protect journalism. The organization is the nations largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

-END-